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GUARANTEES AND THE STATUTE OF FRAUDS

I. In my former paper¹ I endeavored to discuss de Colyar's third, fourth and fifth rules with regard to the kind of promises which fall within the Statute of Frauds. These rules I ventured to restate in the following terms:

A promise to answer for the debt, default or miscarriage of another person is *prima facie* within the Statute of Frauds, but by way of exception the statute does not apply to an agreement between the surety and the creditor if the promise by the former to the latter to answer for the debt, default or miscarriage of another person is merely one incident of the agreement which has some other main or immediate object,

And, in particular, the statute does not apply

(1) if, when the promise is made, there already exists any liability on the part of the promisor (the surety) or of his property except such as arises from his own express promise, or

(2) if the transaction between the promisor (the surety) and the promisee (the creditor) amounts to a sale or surrender by the latter to or for the benefit of the former of a security for the debt of another or of the debt itself.

I propose now to consider some of the cases which relate to de Colyar's first and second rules.

The cases already discussed afford examples of contracts which either are or include true contracts of guarantee, but which have been held, on special grounds, not to be within the statute. The cases now to be discussed afford examples of promises which in some respects bear a misleading resemblance to contracts of guarantee but which are not within the statute because they give rise to original or principal, not collateral, liability on the promisor's part.

The rules in question are as follows:

1. To bring a case within s. 4 of the Statute of Frauds, the primary liability of another person to the promise for the debt, default or miscarriage to which the promise of guarantee relates must exist or be contemplated, otherwise the statute does not apply, and the promise is then valid and can be sued on, though not in writing.²

¹ University of Pennsylvania Law Review, November, 1919. Pp. 1-19.

² Halsbury, Laws of England, vol. 15, par. 889; de Colyar, Law of Guarantees, 3rd ed., p. 65, rule 1.

2. The statute does not apply to any promise to be answerable for another, unless such promise is made to the creditor, that is to say, to the person to whom another is already, or is thereafter to become liable, and who can enforce such liability by action.³

II. It is elementary that in a contract of guarantee there must always be three parties in contemplation: a principal debtor (whose liability may be actual or prospective), a creditor, and a third party who in consideration of some act or promise or forbearance on the part of the creditor promises to discharge the debtor's liability if the debtor fails to do so.

The leading case as to the necessity for the liability of a third party, i. e., the existence of a principal debtor, is *Birkmyr v. Darnell*, (1704),⁴ reported as follows:

Declaration, That in consideration the plaintiff would deliver his gelding to A, the defendant promised that A should re-deliver him safe; and evidence was, that the defendant undertook that A should re-deliver him safe; and this was held a collateral undertaking for another: For where the undertaker comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements; but where the whole credit is given to the undertaker, so that the other party is but as his servant, and there is no remedy against him, this is not a collateral undertaking; but it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment, against the original hirer, as well as assumpsit upon the promise against this defendant.

It appears from the fuller report of the case in Lord Raymond's Reports⁵ that upon the argument, Holt, C. J. with Powell and Gould, J. J. seemed to be of the opinion, against Powys, J., that the case was not within the statute, because English (to whom the horse was delivered upon the defendant's promise that it should be re-delivered) was not liable on the contract, for if any action could be maintained against English, it must be for a subsequent wrong in detaining the horse or actually converting it to his own use, and Powell, J., said "that that rule, of what things shall be within the statute, is not confined to those cases only, where there is no

³ Halsbury, *op. cit.*, vol. 15, par. 891; de Colyar, *op. cit.*, p. 66, rule 2.

⁴ 1 Salk. 27; 1 Sm. Lead Cas. (11 Ed.) 299.

⁵ 2 Lord Raym. 1085, Ames' Cases on Suretyship, 12, *sub nom.* *Birkmyr v. Darnell*.

remedy at all against the other, but where there is not any remedy against him on the same contract."

"The last day of the term the Chief Justice delivered the opinion of the court. He said, that the question had been proposed at a meeting of judges, and that there had been great variety of opinions between them, because the horse was lent wholly upon the credit of the defendant; but that the judges of this court were all of opinion, that the case was within the statute. The objection that was made was, that if English did not re-deliver the horse, he was not chargeable in an action upon the promise, but in trover or detinue, which are founded upon the tort, and are for a matter subsequent to the agreement. But I answered, that English may be charged on the bailment in detinue on the original delivery, and a detinue is the adequate remedy, and upon the delivery English is liable in detinue, and consequently this promise by the defendant is collateral, and is within the reason, and the very words of the statute; and is as much so, as if, where a man was indebted, J. S., in consideration that the debtee would forbear the man, should promise to pay him the debt, such a promise is void⁶ unless it be in writing."

De Colyar⁷ properly refers to the case of *Birkmyr v. Darnell* as raising a doubt as to the applicability of the statute to a promise to be responsible for the future wrongful act or tort of a third person,⁸ but it is not easy to follow the reasoning of his statement that "Any doubt that may have been caused by these observations of Justice Powell, or by the decision in *Read v. Nash*,⁹ was certainly entirely removed by the case of *Kirkham v. Marter*."¹⁰ In neither of the two last mentioned cases was a promise given in respect of the future liability in tort of a third person.

In *Kirkham v. Marter* the defendant's son without leave or license, had ridden the plaintiff's horse, thereby

⁶ Strictly speaking, "void" should be "unenforceable." The mistake is not uncommon in the older cases.

⁷ *Op. cit.*, pp. 62, 63.

⁸ Because the court was at such pains to find a liability in contract.

⁹ (1751), 1 Wils. 305, Ames' Cases on Suretyship, 25.

¹⁰ (1819), 2 B. & Ald. 613, Ames' Cases on Suretyship, 23.

causing the horse's death. In consideration of the plaintiff's refraining from suing the defendant's son for damages for the wrongful act, the defendant promised to pay certain sums to the plaintiff. It was held that the defendant's undertaking was a promise to answer for the debt, default or miscarriage of another within the statute, and was therefore unenforceable because it was not in writing.

In the earlier case of *Read v. Nash* it appeared that the defendant Nash had promised one Tuack to pay £50 and the costs of an action brought by Tuack against one Johnson for assault and battery, in consideration that Tuack should not proceed to trial but should withdraw his record. Tuack withdrew the record, and his executor Read brought action against Nash upon his promise. Lee, C. J., delivered the judgment of the court as follows:

"The single question is, whether this promise, which is confessed by the demurrer not to have been in writing, is within the Statute of Frauds and Perjuries; that is to say, whether it be a promise for the debt, default, or miscarriage of another person; and we are all of opinion that it is not, but that it is an original promise sufficient to found an assumpsit upon against Nash, and is a lien upon Nash, and upon him only. Johnson was not a debtor, the cause was not tried, he did not appear to be guilty of any default or miscarriage, there might have been a verdict for him if the cause had been tried for anything we can tell; he never was liable to the particular debt, damages, or costs. The true difference is between an *original* promise and a *collateral* promise; the *first* is out of the statute, the *latter* is not when it is to pay the debt of another which was already contracted."

De Colyar¹¹ submits that the distinction between the two cases is perfectly clear. "In *Read v. Nash* the promise simply was, *forbear to proceed with the action you have commenced against A. and I will pay you £50.* In *Kirkham v. Marter* it was, *do not make A. pay for his default, and I will do so myself.*"

The distinction between an original undertaking and a collateral undertaking is of course fundamental, and it is true that *Read v. Nash* was distinguished in *Kirkham v. Marter* on the ground that in the former case the undertak-

¹¹ *Op. cit.*, p. 87.

ing was an original one. while in the latter it was collateral. The difficulty is to find any such distinction in either the form or the substance of the promises in the two cases in question. The only substantial difference¹² in the facts is that in *Kirkham v. Marter* the liability of the third party was admitted, whereas in *Read v. Nash* it was not admitted. There is however no reason for assuming in the latter case that the action against the third party was groundless, in view of the fact that Nash promised to pay £50 and the costs in order to prevent it from being brought to trial.

In *Fish v. Hutchinson*¹³ it appeared that an action had been commenced by the plaintiff against one A, and the defendant, in consideration that the plaintiff would stay his action, promised to pay the money owing by A. It was held that the promise was within the statute. *Read v. Nash* was distinguished on the ground that in that case it was doubtful whether there was the existing liability of a third party, whereas in *Fish v. Hutchinson* there was the debt of another still existing and a promise to pay it.

De Colyar¹⁴ says, "It is quite possible to distinguish *Read v. Nash* from *Fish v. Hutchinson*. For in *Read v. Nash* the promise of the defendant was to pay £50 and costs. On the other hand in *Kirkham v. Marter* and *Fish v. Hutchinson*, the defendants promised not to pay the plaintiff a fixed sum of money, but something that a third person was liable to pay."

It is respectfully submitted that the above mentioned efforts to distinguish *Read v. Nash* from the later cases are not productive of any tangible or profitable result. The distinction between an admittedly valid claim against a third party and a claim which, though not admitted, is asserted by action or otherwise seriously maintained, seems to be unreasonable and unsatisfactory as a test of the applicability of the statute to the promise made by the defendant.

¹² Subject to the question whether in *Read v. Nash* the liability of Johnson was extinguished. See the case of *Bird v. Gammon*, *infra*.

¹³ (1759), 2 Wils. 94.

¹⁴ *Op. cit.*, p. 88.

If the claim against the third party is admittedly invalid, *cadit quaestio*, because there is no principal debt to which the defendant's promise can be collateral. But it seems unreasonable to assume the invalidity of the claim against the third party for the purpose of making liable, as on an original promise, a person whose promise is made with respect to that claim.

As regards the sufficiency of the consideration for a guarantee it has been held that if A believes in good faith that he has a fair chance of success, a reasonable ground for suing B, and forbears to sue B on the faith of C's promise to pay, C will be bound if his promise is evidenced as required by the statute.¹⁵ It would seem reasonable that in such a case B's promise to pay either the amount of A's claim against B, or a definite sum of money, in consideration of A's forbearance, should *prima facie* be considered a collateral promise—a promise to answer for the debt, default or miscarriage of another person.¹⁶ Whether the claim against B would have been held valid in an action by A against B or not, it is at least a claim which C considers to be a sufficient foundation for his promise. In such a case it seems unsatisfactory to make the enforceability of C's promise depend upon the validity of the claim against B, because the result would be to impose upon the court which has to pass upon the enforceability of A's claim against the defendant C the necessity of passing also upon the validity of a disputed claim by A against B, although B may not be a party to the action and the court may not have before it adequate material for deciding the question of B's liability.

It may be noted that in the Massachusetts case of *Dexter v. Blanchard*¹⁷ the court repudiated the doctrine that

¹⁵ See, e. g., *Callischer v. Bischoffsheim*, (1870) L. R. 5 Q. B. 449; *Miles v. New Zealand Alford Estate Co.*, (1886) 32 Ch. D. 266; *Drewry v. Percival*, (1909) 19 O. L. R. 463.

¹⁶ Always assuming that the claim against B is not extinguished as a result of the transaction between A and C.

¹⁷ 11 Allen (93 Mass.) 365 (1865), *Ames' Cases on Suretyship*, 26. This was said, however, in a case in which the principal debtor was an infant and the debt was not for necessities. There are cases both in England and the United

an oral agreement to answer for the debt of another would be enforceable if it could be shown that the original contracting party could have established a good defense to the debt in an action against him.

It seems better to say that *Read v. Nash* was in effect overruled by *Kirkham v. Marter*,¹⁸ or in other words that the decision in *Read v. Nash* that the promise there in question was an original, not a collateral, promise was wrong on the facts, and that the case is indistinguishable from *Kirkham v. Marter*, in which the promise was clearly collateral. This conclusion is, however, to be read subject to the construction put upon *Read v. Nash* in the case of *Bird v. Gammon*¹⁹ in which the earlier case was expressly followed. One Lloyd, being an execution debtor of the plaintiff, conveyed all his property to the defendant, the defendant undertaking to pay Lloyd's creditors. The plaintiff then, with the consent of Lloyd and the defendant, withdrew his execution. It was held that the defendant's undertaking was not a promise to pay the debt of a third person, but an agreement that if the plaintiff would forego his claim on Lloyd, the defendant would pay the amount of the debt on his own account. It was objected that the plaintiff, if he failed in this action, might still sue Lloyd or issue execution; but it was answered by Tindal, C. J., "if he were to do so, Lloyd might show, on plea or *audita querela*, that on good consideration the plaintiff gave up his remedy against Lloyd, and took the defendant's liability instead; which though not properly accord and satisfaction, would be a complete defense on the general issue; *Good v. Cheeseman*²⁰ and the cases there cited." The case was therefore decided on the

States in which it has been held that in such a case the promise is an original one and outside the statute by reason of the absence of any principal debt. *Harris v. Huntbach*, (1751) 1 Burr. 373; *Chapin v. Lapham*, 20 Pick. (37 Mass.) 467 (1838); *Downey v. Hinchman*, 25 Ind. 453 (1865). Probably a distinction must be made between the contract of an infant which is merely voidable and one upon which it is legally impossible for him to incur personal liability. Halsbury, *Laws of England*, vol. 15, p. 459.

¹⁸ See note to *Forth v. Stanton*, Wms. Saunders (1871 ed.) 231.

¹⁹ (1837) 3 Bing, N. C. 883, Ames' Cases on Suretyship, 29.

²⁰ (1831) 2 B. & Ad. 328.

ground that there had been novation and an extinguishment of the original debtor's liability.

Of course if the effect of the promise is to extinguish the liability in respect of which the promise is made, the promise must be an original promise. It cannot be a collateral promise if there is no continuing liability of another to which it is collateral. But it is to be observed that in *Bird v. Gammon* the court has virtually invented a new ground of justification for *Read v. Nash*. If the effect of Nash's promise and the withdrawal of the record in the action against Johnson was to extinguish Johnson's liability to be sued, then clearly Nash's promise was an original promise for which no writing was required. But this view of *Read v. Nash* puts it in a different class of cases. Looked at in this way, it is no longer a decision that the defendant's promise was original because Johnson's liability to the plaintiff was uncertain, as put in the case itself, and it is no longer difficult to distinguish it from *Kirkham v. Marter* and *Fish v. Hutchinson*. In each of the latter cases we must assume that the liability in respect of which the promise was made was not extinguished by the transaction between the plaintiff and the defendant, otherwise the decision would be clearly wrong as the decision in *Read v. Nash* would be clearly right.

In *Goodman v. Chase*²¹ the plaintiffs having recovered judgment and sued out a *ca. sa.* under which the defendant's son was arrested, the defendant promised to pay the damages and costs. It was held that the promise was an original promise in consideration of the discharge of the debt as between the plaintiffs and the defendant's son. It will be observed that this case was a simple one in this respect, that there was no question but that the debt was discharged as a result of the transaction between the plaintiffs and the defendant, because the discharge of the defendant's son from custody with the plaintiff's consent operated in law as

²¹ (1818) 1 B. & Ald. 297, Ames' Cases on Suretyship, 27; cf. *Eden v. Chaffee*, 160 Mass. 225 (1843); *Bailey v. Gillies* (1902) 4 O. L. R. 182 at p. 190.

a discharge of the debt. The defendant alone was liable and his promise was necessarily original, not collateral. It was therefore unnecessary to consider whether the memorandum signed by the defendant was sufficient under the statute.²²

The cases already mentioned leave open the question whether a promise to answer for the future liability in tort of another person is within the statute. In *Kirkham v. Marter* the liability was purely tortious, but the wrongful act had been already committed when the defendant's promise was made. In *Birkmyr v. Darnell* the liability which was the subject of the promise was merely contemplated when the promise was made, but the court found it possible to regard it as a liability arising out of contract.

It is interesting to note, however, in connection with *Birkmyr v. Darnell*, that whether or not the action of detinue is technically an action founded on contract, it has been held in modern times that where a person is sued in detinue for holding goods to which another person is entitled, the real cause of action in fact is a wrongful act, and not a breach of contract, because it may arise when there is no contract, and the remedy sought is not a remedy which arises upon a breach of contract.²³

It is probable in any case that the words of the statute are wide enough to cover a promise to answer for the future wrongful act of a third person not arising out of a contract,²⁴ but in practice a promise to answer for the future default

²² The sufficiency of the memorandum was disputed on the authority of *Wain v. Warlters*, (1804) 5 East 10, which was long regarded as of doubtful authority, but was at last confirmed by *Saunders v. Wakefield*, (1821) 4 B. & Ald. 505; *De Colyar, op. cit.*, pp. 163-4. By statute in England (19 & 20 V. c. 97, s. 3) and in Ontario (R. S. O. 1914, c. 102, s. 6) the consideration for a guarantee need not now appear in the memorandum.

²³ *Bryant v. Herbert*, (1878) 3 C. P. D. 389, C. A., reversing 3 C. P. D. 189. The question what was the nature of the action of detinue had been an open question for several centuries. See *Pollock & Maitland, Hist. Eng. Law*, 2nd ed., vol. 2, p. 180. *Anson (Contract, 14th ed. 1917, p. 62, 3rd Am. ed. 1919, p. 74)* adds: "Detinue is in fact founded in bailment, but the contract of bailment imposes general common law duties the breach of which may be treated, and should be treated, as a wrong. The judgment of *Collins, L. J.*, in *Turner v. Stallibras* (1898) 1 Q. B. 59, states this clearly."

²⁴ As to the different meanings suggested for the words "debt," "default" and "miscarriage" see *Halsbury, Laws of England*, vol. 15, p. 455, note (s).

or miscarriage of another person usually refers to some contractual liability of that other person.

The cases in which the guarantee precedes the liability of the principal debtor, that is, in which the guarantee is given in order to obtain credit for another person, raise some questions which require special consideration.

As Street points out,²⁵ it seems strange that it did not occur to the courts, when the interpretation of the statute was yet open, that the words "to answer for the debt, default, or miscarriage of another" contemplated only claims already in existence at the time the collateral promise is made. "It will be noticed that all personal engagements by the representatives of a deceased person must necessarily be collateral to existing claims. Strong reasons may be advanced for believing that the succeeding clause contemplated the same situation. The reason of the statute certainly does not apply with as much force where the guaranty is given before the principal obligation is incurred as where the collateral promise is made afterwards; for the guaranty almost invariably draws the consideration, *e. g.*, the credit from the promisee.

"Recognition of the distinction just stated would have made the clause in question vastly less radical than it actually proved to be. Lord Mansfield had the acumen to perceive that the statute did not apply to any case where the promise sued on induced the creation of the principal obligation.²⁶ Upon further consideration, however, this distinguished judge found that the law was already settled differently and that the rule was too firmly fixed to be shaken.²⁷ At a later day, Buller, J. had occasion to lament that the question was no longer open for consideration."²⁸

In *Jones v. Cooper*²⁹ Lord Mansfield, at the close of the argument, said, "The general distinction is a clear one,

²⁵ Foundations of Legal Liability (1906), vol. 2, p. 188; cf. de Colyar; *op. cit.*, pp. 108-109.

²⁶ *Mawbrey v. Cunningham*, (1773) cited in *Jones v. Cooper* (next note).

²⁷ *Jones v. Cooper*, (1774) Cowp. 228, Ames' Cases on Suretyship, 2.

²⁸ *Matson v. Wharam*, (1787) 2 T. R. 80. See language of Parker, C. J., in *Perley v. Spring*, 12 Mass. 297 (1815), afterwards disapproved in *Cahill v. Bigelow*, 18 Pick. (35 Mass.) 369 (1836).

²⁹ *Ubi supra*.

and upon that distinction the case which has been cited (*Mawbrey v. Cunningham*) was determined. Where the undertaking is before delivery, and there is a direction to deliver the goods, and 'I will see them paid for,' it is not within the Statute of Frauds. But there may be a nicety where the undertaking is before delivery, and yet conditional as this is. It turns simply upon the undertaking being in case the other did not pay. We will look into it." On the following day he delivered the unanimous opinion of the court that the promise by the defendant to pay, if Smith did not, was a collateral undertaking within the statute.

In *Peckham v. Faria*³⁰ the promise—"You may not only ship that parcel, but one, two, or three thousand more, and I will pay you if he does not"—was in form indistinguishable from that in *Jones v. Cooper*, and the same result was reached. Lord Mansfield said:

"Before the case of *Jones v. Cooper* I thought there was a solid distinction between an undertaking after credit given and an original undertaking to pay; and that, in the latter case, the surety, being the object of the confidence, was not within the statute; but in *Jones v. Cooper*, the court was of opinion that wherever a man is to be called upon only in the second instance, he is within the statute; otherwise, where he is to be called upon in its first instance."

In *Matson v. Wharam*³¹ the defendant asked Matson, one of the plaintiffs, if he was willing to serve one Robert Coulthard of Pontefract with groceries; he answered that they dealt with nobody in that part of the country and did not know Coulthard; to which the defendant replied, "If you do not know him you know me, *and I will see you paid.*" Matson then said he would serve Coulthard; and the defendant answered, "He is a good chap, *but I will see you paid.*" A letter was afterwards received by the plaintiffs from Coulthard containing an order for goods, and the goods were sent to Coulthard accordingly. The goods were charged to Coulthard in the plaintiff's books. They wrote to Coulthard for payment, and getting no answer they applied to

³⁰ (1781) 3 Doug. 13.

³¹ (1787) 2 T. R. 80.

the defendant, who refused to pay. In form, it will be observed, the promise was indistinguishable from that in *Mawbrey v. Cunningham*, and therefore it was not open to the court to distinguish the cases upon the ground put forward by Lord Mansfield in *Jones v. Cooper*. It was necessary either to follow or to overrule *Mawbrey v. Cunningham*, and the court chose the latter alternative. Buller, J. said, "If this were a new question, the leaning of my mind would be the other way; for Lord Mansfield's reasoning in the case of *Mawbrey* and *Cunningham* struck me very forcibly. But the authorities are not now to be shaken; and the general line now taken is, that if the person for whose use the goods are furnished be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds, 29 Car. 2, c. 3."

In the same sense in *Birkmyr v. Darnell*³² it had been already pointed out that "where the whole credit is given to the undertaker, so that the other party is but as his servant, *and there is no remedy against him*, this is not a collateral undertaking," and the report in Salkeld closes with the following illustration:

"Et per cur. If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, *If he does not pay you, I will*, this is a collateral undertaking, and void without writing, by the Statute of Frauds. But if he says, let him have the goods, *I will be your paymaster*, or *I will see you paid*, this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant."

From a comparison of the last illustration given in *Birkmyr v. Darnell* with the words of the undertaking in *Matson v. Wharam*, it results that the form of words used is only *prima facie* a test of the nature of the promise. As expressed by Brewer, J. in delivering the judgment of the Supreme Court of the United States in *Davis v. Patrick*,³³ "the real character of the promise does not depend alto-

³² (1704) 1 Salk. 27.

³³ 141 U. S. 479 (1891).

gether upon the form of expression, but largely on the situation of the parties."

On the one hand, the promise may be absolute in form, *prima facie* implying original liability, as "I will see you paid" or "I will be your paymaster." It may nevertheless be shown that credit is in fact given by the promisee to a third party, who becomes personally liable, and that the promisor's liability is really collateral. In *Keate v. Temple*,³⁴ for instance, the defendant, a first lieutenant in the Navy, serving on the ship *Boyne*, promised to see the plaintiff paid for clothing to be supplied to the crew. A verdict in favor of the plaintiff was held to be against the weight of evidence, the court considering that credit was given to the crew in the first instance.

On the other hand, the promisor may use language *prima facie* implying that some one else is bound, as "I will pay if A does not pay." The implication that the promise is collateral may nevertheless be rebutted by proof that credit was given solely to the promisor or that there was in fact no principal liability to which the promisor's liability could be collateral, as, for instance, where goods are furnished to a third person on the credit of the promise but the third person gives no order or does not become liable at all. In *Mease v. Wagner*³⁵ the defendant promised to pay for certain articles for the funeral of Mrs. Bradley, saying, "Charge them to the estate of Dr. Bradley, and as soon as his nephew comes to town he will pay for them, or I will." As neither the estate of Dr. Bradley nor his nephew was liable, the defendant's promise was held to be an original undertaking and therefore not within the statute.

If the promise sued on embodies the only liability arising out of the transaction in respect of which the promise is made, the promisor's liability is necessarily original, and the statute does not apply. Street³⁶ refers to the illustrations given in *Birkmyr v. Darnell*, and adds, "This rule has been

³⁴ (1797) 1 B. & P. 458.

³⁵ (1821) 1 McCord (S. C.) 395, Ames' Cases on Suretyship, 20.

³⁶ Foundations of Legal liability (1906) vol. 2, pp. 185-6.

reduced to greater certainty, though possibly not without some violence to principle, by holding that the credit must be extended solely to the promisor in order to keep the statute from applying. Therefore, if any credit at all is given to the purchaser, the promise must be in writing.³⁷ In cases of this kind, where one party is said to come in aid to procure credit for another, it is possible for the tradesman to give credit to them both jointly. If this be done, both are liable as debtors and no writing is necessary."³⁸

The leading modern English case is *Lakeman v. Mountstephen*.³⁹ The plaintiff Mountstephen, a contractor and builder, had completed for the board of health of the town of Brixham a main sewer in the town, and the board, under statutory authority, had given notice to the owners of certain houses directing them to connect their drains with the main sewer and stating that if they failed to make the connections the board would do so at their expense. The householders did not obey the order, and the surveyor of the board asked the plaintiff to procure the material and do the work. The plaintiff declined to do either unless the board would be responsible for the payment. An order of the board was given as to the material and the plaintiff procured the necessary piping, but still declined to do the work. Some days afterwards a conversation took place between the plaintiff and the defendant Lakeman, the chairman of the board.⁴⁰ Lakeman said, "What objections have you to make these connections?" The plaintiff answered,

³⁷ *Matson v. Wharam*, *supra*.

³⁸ *Swift v. Pierce*, 13 Allen (95 Mass.) 136 (1866); *Gibbs v. Blanchard*, 15 Mich. 292 (1867); *Ames' Cases on Suretyship*, 4; *Wainwright v. Straw*, 15 Vt. 215 (1843).

³⁹ (1874) L. R. 7 H. L. 17, *Ames' Cases on Suretyship* 14, affirming the decision of the Court of Exchequer Chamber, L. R. 7 Q. B. 196, which had reversed the judgment of the Court of Queen's Bench, L. R. 5 Q. B. 613 (*Mountstephen v. Lakeman*).

⁴⁰ The words of this conversation are taken from the judgment of Lord Cairns, L. C. The plaintiff's version alone is material, because the jury found a verdict for the plaintiff, and the only question in the appellate courts was whether there was sufficient evidence for the jury of an enforceable promise. The Queen's Bench directed a nonsuit to be entered on the ground that the defendant's words under the circumstances amounted only to a promise to pay if the board did not. On appeal the Exchequer Chamber reversed this decision.

"I have no objection to do the work if you or the local board will give me the order." Lakeman replied, "Mountstephen, you go on and do the work, and I will see you paid." The plaintiff thereupon did the work and charged the account to the board, and upon its refusal to pay brought action against the defendant. It was held that Lakeman had undertaken to pay personally, the liability being an original liability to which the statute did not apply.

Lord Cairns considered that the natural meaning of the plaintiff's words was that he would do the work either if he had a formal order from the board or if he had a personal order from Lakeman, and that Lakeman gave him a personal order. Lakeman thus rendered himself personally liable in the first instance, and neglected afterwards to protect himself by obtaining from the board a formal order and acting and paying under that order.⁴¹

Lord Selborne, in the course of his concurring opinion, said,

"There are some observations in the opinions of the learned judges of the Queen's Bench which certainly do look at first sight as if some of those learned judges thought that there might be a valid contract of suretyship,—although there might be in truth no principal debtor. If that was the view of the learned judges, with all respect to them, I must confess myself unable to follow it. There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed."⁴²

The foregoing cases illustrate the first rule,⁴³ that a promise is not within the statute unless there is an existing

⁴¹ In other words no credit was given to the board. In this sense the case was followed in Ontario in *Petrie v. Hunter*, (1884) 10 O. A. R. 127, and *Simpson v. Dolan*, (1908) 16 O. L. R. 459. The last mentioned case was distinguished on the facts in *McWilliam v. Sovereign Bank*, (1909) 14 O. W. R. 561. In *Gillies v. Brown*, (1916) 53 Can. S. C. R. 557, affirming *Brown v. Coleman Development Co.*, (1915) 35 O. L. R. 219, it was held on the facts that the promise made by the defendant Gillies to repay to the plaintiff money advanced by the latter for the benefit of the defendant company was not within the statute.

⁴² *Lakeman v. Mountstephen* was distinguished in Ontario in *Bond v. Treahey*, (1875) 37 U. C. R. 360, and *James v. Balfour*, (1882) 7 O. A. R. 461, the promises being similar in terms but there being a continuing liability of a third person.

⁴³ That is, de Colyar's first rule, stated at the beginning of this paper.

or contemplated liability of a third person to which the promise is collateral. On the same principle, a promise to procure the signature of a third person to a guarantee is not within the statute, this not being a promise to answer for another,⁴⁴ though a promise to give a guarantee in the future is within the statute.⁴⁵

III. The second rule⁴⁶ requires that a promise, to be within the statute, shall be made to the creditor of the third person. Thus a promise made to a debtor to pay what he owes or is liable for is not within the statute.⁴⁷

It has also been held that a promise to a firm of which the promisor is a member to pay what a third person owes to the firm, if the third person fails to pay, is not within the statute. Such a promise is not a promise to the creditors, or at least not one which the creditors could enforce at law, but is a promise by one partner to his co-partners to make good to the firm the loss if a debtor of the firm fails to pay what he owes to the firm.⁴⁸

There remains one difficult class of cases which illustrate the rule that the promise must be made to the creditor. The so-called indemnity cases oblige us further to define the rule by saying that the promise must be made to the creditor in his capacity as creditor. The promise under the statute "must be distinguished from a contract of indemnity, or promise to save another harmless from the result of a transaction into which he enters at the instance of the promisor."⁴⁹

The leading case as to a contract of indemnity is *Thomas v. Cook*.⁵⁰ A and B dissolved partnership, it being agreed

⁴⁴ *Bushell v. Beaven*, (1834) 1 Bing. N. C. 103, Ames' Cases on Suretyship, 21.

⁴⁵ *Mallet v. Bateman*, (1865) L. R. 1 C. P. 163, Ames' Cases on Suretyship, 56.

⁴⁶ De Colyar's second rule, stated at the beginning of this paper.

⁴⁷ *Eastwood v. Kenyon*, (1840) 11 A. & E. 438, Ames' Cases on Suretyship, 32; *Barker v. Bucklin*, 2 Den. (N. Y.) 45 (1846). So, if the promise is made to one who is neither creditor nor debtor. *Reader v. Kingham*, (1862) 13 C. B. N. S. 344.

⁴⁸ *In re Hoyle*, *Hoyle v. Hoyle*, (1893) 1 Ch. 84.

⁴⁹ Anson on Contract, 14th ed. (1917), p. 80, 3rd Am. ed. 1919, p. 95.

⁵⁰ (1828) 8 B. & C. 728, Ames' Cases on Suretyship, 48; cf. *Harrison v. Sawtel*, 10 John. (N. Y.) 242 (1813), Ames' Cases on Suretyship, 54.

that A should take upon himself the payment of certain debts and that a bond should be executed by A and two other persons to save B harmless from the payment of the debts. Thereafter the plaintiff, at the request of the defendant, executed a bond together with the defendant and A, the defendant orally promising the plaintiff to save him harmless from any payments which he might have to make under the bond. The plaintiff was afterwards compelled to pay under the bond and sued the defendant. It was held that the defendant's promise to indemnify the plaintiff was not within the statute.

A different conclusion was reached in *Green v. Cresswell*,⁵¹ but the last mentioned case was disapproved in *Wildes v. Dudlow*,⁵² and other cases, and finally *Thomas v. Cook and Wildes v. Dudlow* were approved and followed in the important case of *Guild v. Conrad*.⁵³

The case of *Guild v. Conrad* is particularly instructive, because it affords an illustration of both an indemnity and a guarantee, and it is admittedly very near the line. The plaintiff (William Binney) carried on business under the name of Guild & Co. in London. He was in correspondence with a Demerara firm of Conrad, Wakefield & Co., one of the partners in which was a son of the defendant Julius Conrad. By a letter of June, 1888, the defendant agreed to guarantee payment up to £5000, of drafts made by the Demerara firm upon the plaintiff and accepted by him if funds should not be provided at maturity by the drawers. There is no question but that that was a guarantee in the proper sense of the term, that is, an undertaking to be responsible up to £5000 if the Demerara firm should make default. That undertaking was in writing; but in March, 1891, the defendant orally agreed to increase the guarantee to £6000 in consideration of the plaintiff's agreeing to increase the credit of the Demerara firm to £10000. The

⁵¹ (1839) 10 A. & E. 453, Ames' Cases on Suretyship, 49.

⁵² (1874) L. R. 19 Eq. 198, Ames' Cases on Suretyship, 52; cf. *Tighe v. Morrison*, 116 N. Y. 263 (1889).

⁵³ (1894) 2 Q. B. 885.

plaintiff claimed the increased amount under this oral guarantee, but the trial judge (Mathew, J.) held this part of the action not maintainable because of the Statute of Frauds, and no appeal was taken from this part of his judgment. The plaintiff also claimed upon an oral promise of the defendant made in December, 1891, and another made in January, 1892, when some bills drawn by the Demerara firm were coming due which the plaintiff was unwilling to accept in view of the overdrawn state of the firm's account. The evidence was conflicting as to what was said at the interviews which took place between the plaintiff and the defendant on these two occasions, but the trial judge found that the defendant promised the plaintiff that if the plaintiff accepted the bills drawn by the defendant's son's firm, the defendant would provide funds to enable the plaintiff to meet the bills at maturity, and held that the defendant's promise was not a contract to pay if the firm did not pay, because there was no expectation that the firm would be able to pay. On the faith of that promise the plaintiff accepted the bills. The Court of Appeal, affirming the trial judge, held that the defendant was liable, following the case of *Thomas v. Cook*, and some later cases.

Street⁵⁴ says, "This class of cases has given a great deal of trouble, for it often happens that two antagonistic elements are found in the transaction, one of which would seem to show that the undertaking is independent and therefore not within the statute, while the other would as clearly indicate that the statute applies. Thus, the giving by C to A of a promise to indemnify him for some act of his own may occur in a case where there is an implied obligation on the part of B also to indemnify him for the same act. As we have already seen, a promise to satisfy an obligation which is already valid as against another is almost necessarily within the statute. These two antagonistic factions have led to confusion and conflict."

⁵⁴ Street, *Foundations of Legal Liability* (1906), vol. 2, pp. 186-187. The author then refers to *Thomas v. Cook*, *Green v. Cresswell*, and some of the decisions overruling *Green v. Cresswell*.

Guild v. Conrad, though not cited by the author of the passage just quoted, is a striking example of a case in which antagonistic elements are found. The fact that as a result of the defendant's promise a further credit was in effect to be given by the plaintiff to a third person, who would thereby become subject to a further liability, might have been considered by the court as a ground for regarding the defendant's promise as collateral, but the court found in the transaction other elements indicating that the promise was original. On the other hand, if the liability of the third party is existing, not merely in contemplation, at the time of the defendant's promise, it would appear to be impossible to regard the transaction as a contract of indemnity.

On the point last mentioned it will be sufficient, in conclusion, to refer to the English case of Harburg v. Martin,⁵⁵ and the earlier Ontario case of Beattie v. Dinnick,⁵⁶ which were similar in their circumstances, and in each of which it was unsuccessfully argued that the transaction amounted to a contract of indemnity. The facts of Harburg v. Martin have already been mentioned.⁵⁷ In Beattie v. Dinnick the plaintiff was the holder of a promissory note made by a limited company payable three months after date, which note was a renewal of a former note. The action against the defendant Dinnick was based upon an oral promise made by the defendant to the plaintiff at or about the maturity of the earlier note to the effect that if the plaintiff would forbear to sue the company upon the note and would renew it, the defendant would see that the plaintiff got his money. A divisional court held, reversing the judgment at the trial, that the promise was within the statute. Street, J., delivering the judgment of the court, said,⁵⁸

"The distinction between a promise to pay a debt already due a creditor, or one to be created upon the faith of the promise

⁵⁵ (1902) 1 K. B. 778.

⁵⁶ (1896) 27 O. R. 285.

⁵⁷ In my former paper, *supra*, p. 4.

⁵⁸ Beattie v. Dinnick, 27 O. R. 285, at p. 293.

on the one hand; and a promise that if the promise will incur a liability the promisor will indemnify him against it on the other hand, is not at all a shadowy one, and when the terms of the statute and the interpretation placed upon it by undisputed cases are considered, the reasons for holding the latter class of promises to be unaffected by it, while holding the former class to be within it, seem to be unanswerable. It has been well settled that the statute applies only to promises made to the person who is or is because of the promise made to him, to become creditor, and does not apply to promises made to the debtor or any one else.⁵⁹

"The promise intended by the statute is therefore a promise made to a creditor or intending creditor in that capacity. But where the promise is made to one who is not a creditor, that if he will incur a liability to some third person, the promisor will indemnify him against it, it is not made to him as a creditor at all, but rather in the character which he is asked to assume of debtor to the third person."

John Delatre Falconbridge.

⁵⁹ Eastwood v. Kenyon, *supra*; Wildes v. Dudlow, *supra*.